IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

RICHARD A. KNIGHT,
Petitioner,

AGAINST

THE BAR ASSOCIATION OF THE CITY OF NEW YORK.

No. .....

Brief in Support of Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

POINT I.

The order of disbarment and Section 88 (2) of the Judiciary Law of the State of New York by which it purports to have been authorized, constitute violations of petitioner's right of free speech and free press and are, therefore, unconstitutional.

It is not claimed by the Association that there was any reference in any of petitioner's letters to any judge before whom there was any litigation pending to which the letters referred and, in fact, there was not. In the words of the dissenting opinion in *Bridges* v. *California* (314 U. S. 252), there was no "threat to litigation obviously

alive", no decision was "hanging in the judicial balance" and there was no "real and substantial threat to the impartial decision by a Court of a case actively pending before it".

Similarly, it is not claimed by the Association and was not found by the Referee that there was any statement made in the letters concerning any judge that was untrue or unjustified.

Thus, it is demonstrated that the position taken by the Association and adopted by the Appellate Division and by the Court of Appeals is, simply put, that any lawyer who dares to publish derogatory statements, no matter how true and no matter how justified, concerning any judge, no matter how corrupt and how insolent, may, under the provisions of Section 88 (2) of the Judiciary Law of the State of New York, be disbarred and deprived of his livelihood.

If Section 88 (2) of the Judiciary Law authorizes such a position, it manifestly (again to quote the dissenting opinion in *Bridges* v. *California, supra*) "places an indiscriminate ban on public expression that operates as an overhanging threat to free discussion" and "it must fall without regard to the facts of the particular case. *This is true whether the rule of law be declared in a statute or in a decision of a Court. Thornhill* v. *Alabama,* 310 U. S. 88, 84 L. ed. 103, 60 S. Ct. 736; *Cantwell* v. *Connecticut,* 310 U. S. 26, 84 L. ed. 1213, 60 S. Ct. 900, 128 Alr. 1352."

Although petitioner's insistence here upon the truth of the statements contained in the letters is unremitting, it is, nevertheless, significant that in the dissenting opinion above quoted the position was taken that the question of the truth or falsity of the statements in such a case is unimportant. Specifically, in this connection the Court said:

> "Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered."

The final word, however, in support of petitioner's position was uttered in the majority opinion in the same case of *Bridges* v. *California* where the Court said:

> "For the First Amendment does not speak equivocally. It prohibits 'any law abridging the freedom of speech or of the press'. It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

POINT II.

The proceeding in the Court below was unauthorized by the law of the State of New York and was in contrariety to that law and was a violation of due process and departed so drastically from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The proceeding was instituted by the service on petitioner on or about December 26th, 1941 of the Petition and, not an order to show cause, but a mere Notice that the matter would be presented to the Appellate Division, First Department, on January 9th, 1942.

The papers were served by John T. Cahill, as attorney for the petitioner although Cahill had not been appointed by the Appellate Division, First Department, to serve them or to prosecute the proceeding.

That Court had not otherwise authorized the proceeding and had conducted no preliminary investigation into the charges contained in the Petition before its service.

It is the unquestionable law of New York that a disciplinary proceeding against an attorney may be instituted *only* by the affirmative act of an Appellate Division.

No Bar Association, no attorney nor any other person may institute such a proceeding.

That this is the law was clearly laid down by the Appellate Division, First Department, itself as long ago as 1877 in *Matter of Brewster* (12 Hun 109) wherein the Court said:

> " * * * all proceedings to disbar or suspend attorneys and counsellors should originate in the action of the Court itself. Attorneys or parties are not at liberty to commence such proceedings by motion and notice. But every person who desires such an investigation should, in the first instance, present to the Court affidavits or other authenticated papers for its examination *preliminary to any proceeding.* (Anonymous, 22 Wend. 656; *In re Percy,* 36 N. Y. 651; *In re Petersen,* 3 Paige 510.)
>
> "The Court will in all cases give careful consideration to the charges and, if satisfied of their probable truth and that they are of sufficient importance to call for answer and investigation, *will institute the proceedings of its own motion* in the form prescribed and *required* formerly by the Revised Statutes and now by the Code of Civil Procedure. (1 R. S. 109, Sections 24, *et seq.;* Sections 67 and 68 Code Civ. Proc.) (Author's Note: Sections 67 and 68, Code Civ. Proc. are now incorporated in Sections 88, 476 and 477 of the Judiciary Law.)

> "In no other way can the reputation of attorneys be protected from the improper assault of interested or malicious persons. It is the duty of the Court scrupulously to guard against such attacks and for that reason *departures from the correct and safe practice will not be tolerated.*
>
> "In this case an attorney gave notice of a motion, on behalf of his client, for an order that the respondent show cause why an order should not be made striking his name from the roll for certain alleged acts of misconduct set forth in the papers; and the papers on which the motion is founded and those made in opposition have been submitted to the Court. *The motion ought properly to be dismissed for irregularity.*"

It is difficult to conceive of how any Court could have made the law of a proceeding of this character more clear than did the Appellate Division in the categorical opinion above quoted.

The Reports, moreover, fail to disclose a single case in which that Court has ever intimated that its conception of the law as above set forth is in any particular changed.

Despite this fact, when petitioner appeared specially at the commencement of this proceeding and moved for its dismissal on the ground that the Association was wholly without authority to have instituted the proceeding on notice and that its attorney, Cahill, not having been directed by he Appellate Division, First Department to serve and prosecute the charges, was wholly without power to do so, that Court, without opinion, summarily dismissed the motion.

The provisions of Sections 67 and 68 of the Code of Civil Procedure which the Court in the opinion quoted above found "require" a proceeding of this character to be instituted *only* upon the motion of an Appellate Divi-

sion, are now Sections 88, 476 and 477 of the Judiciary Law and appear there unchanged insofar as they are pertinent to the issue here presented. So that there can be no contention that the ruling of the Court below on petitioner's motion to dismiss this proceeding for irregularity was attributable to any change in the statutory law.

On the contrary, that law, as set forth in Section 476 is explicit and emphatically sustains the position here taken that a disciplinary proceeding may be instituted *only* by an Appellate Division and prosecuted *only* by an attorney designated by the presiding justice thereof.

The pertinent part of Section 476 reads as follows:

> "SECTION 476: SUSPENSION OR REMOVAL OF ATTORNEYS MUST BE ON NOTICE. Before an attorney or counsellor at law is suspended or removed as prescribed in Section 88 of this chapter, a copy of the charge must be delivered to him personally within or without the State or, in case it is established *to the satisfaction of the presiding justice* of the Appellate Division Supreme Court *to which the charges have been presented,* that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise *as the presiding justice may direct* and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any District Attorney within a department, *when so designated by the presiding justice* of the Appellate Division of the Supreme Court to prosecute all proceedings for the removal or suspension of attorneys and counsellors at law *or the presiding justice may,* in a county wholly included within a City or in a county having a population of over 300,000 inhabitants, *appoint an attorney and counsellor at law* desig-

> nated by a duly incorporated Bar Association *approved by him,* to prosecute any such proceedings and upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor at law for the services rendered *under such designation* which compensation shall be a charge against the county specified in his certificates and shall be paid thereon."

The passages italicized by us in the above, certainly leave no room for doubt that the indisputable intendment of the statute is that charges in a disciplinary proceeding against an attorney in the State of New York may be served upon and prosecuted against him *only upon the express order of the presiding justice* of an Appellate Division of the Supreme Court and that no other person may serve and undertake to prosecute such charges without the authority of such an order.

The decisions of the other Courts of the State in connection with this matter are as explicit and unmistakable as this statute and as the decision of this Court in *Matter of Brewster, supra.*

The decisions of the Appellate Division, Second Department on the point are numerous:

In *Matter of Brooklyn Bar Association* v. *Valentine,* 92 App. Div. 612 (1904) the Court held:

> "After the *preliminary examination* of the verified petition which has been presented to the Appellate Division in this matter, the *prescribed method of procedure in cases of this kind requires the issuance of a formal order directing the accused attorney to show cause* why he should not be suspended from practice or removed from office (*Anonymous,* 22 Wend. 656; *Matter of Percy,* 36 N. Y. 651; *Matter of Brewster,* 12 Hun 109; *Matter of Eldredge,*

> 82 N. Y. 161). That course will be pursued in the present case, and if, upon the return of the order to show cause the attorney makes the same denials which he has already made informally, the matter will be sent to a Referee to take testimony in accordance with the practice approved by the Court of Appeals in the *Eldredge* case."

To the same identical effect, cf. the following:

> *Matter of Eugene Hayne*, 92 App. Div. 612;
> *Matter of James A. Murtha, Jr.*, 92 App. Div. 612;
> *Matter of Albert M. Fragner*, 92 App. Div. 612.

A decade after the cases immediately above, the law was again specifically laid down to the same effect by the same Court. In *Matter of Wilson*, 158 App. Div. 607 (Second Dept., 1913), on the application of an attorney for an inquiry into his own professional conduct of a litigation, the Court said:

> "Under subdivision 2 of Section 88 of the Judiciary Law, it is our duty, upon presentation of any matter which may or might require disciplining of an attorney and counsellor, to examine it and *if we determine that it requires investigation to cause the institution of proceedings.* Such proceedings contemplate presentation of charges to be delivered to the attorney to whom must be afforded an opportunity of being heard in his defense.
>
> "We think that the subject matter here justifies such proceedings as are prescribed by the judiciary law. The Court designates William C. Dykeman and Stanley C. Baldwin to prepare charges in the premises and report them to this Court for its action."

It is the decisions of the Court of Appeals, however, which obviate any possibility of the interpretation of the law here insisted upon being reasonably disputed. In case after case, that Court has uniformly held that *a disciplinary proceeding may be instituted only by an Appellate Division through the instrumentality of an order to show cause.*

In *In re John Percy,* 36 N. Y. 651 (1867), the Court of Appeals held:

> "No question is made as to the correctness of the practice adopted in bringing the matter before the Court. *That was an order to show cause,* founded upon the papers presented, served with the papers personally upon the appellant."

In the same case further along in the opinion the Court stated:

> "The Court may and *ought* to cause the charges to be preferred whenever satisfied from what has occurred in its presence or from any satisfactory proof that a case exists where the public good and the ends of justice calls for it."

The foregoing case was cited as the law of this State by the Court of Appeals in *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465 (1928) where it said at page 477:

> "The power of the Court in the disciplining of its officers is in truth a dual one. *It prefers the charges and determines them.* * * * Preliminary *investigation there must be,* at least to some extent before a decision can be reached whether to prosecute at all."

To the same effect is the opinion of the Court of Appeals in *Matter of Dolphin,* 240 N. Y. 89 (1925) wherein that Court stated:

> "* * * it seems to us quite clear the Association simply discharges the duty of calling to the attention of the Appellate Division under our law charged with the duty of supervising the conduct of attorneys, some alleged misconduct *and then, if the Appellate Division thinks that course should be pursued,* discharges the further duty of prosecuting the accusation and presenting the evidence which will enable the Court finally to decide whether it should exercise its disciplinary powers * * *."

The foregoing cases demonstrate it to be beyond reasonable dispute that a disciplinary proceeding against an attorney may be instituted *only* by the Appellate Division upon an order to show cause. And it is of interest to note that the Association has in these proceedings proved wholly unable to quote a single case or to advance a single comprehensible argument to sustain its unauthorized course in bringing the proceeding on by a Notice through the agency of an attorney specially employed by it for the purpose who has, of course, never even pretended that he had been designated for the purpose by the presiding justice of the Appellate Division, First Department.

It has conceded in its briefs that "up to about 1904 the practice generally followed for the institution of disciplinary proceedings was by way of an order to show cause. This practice has, however", it has said, "long been outmoded".

It has omitted to say, however, that the practice has "long been outmoded" *only* in the County of New York of all the Counties of the State and *only* by the Bar Association of the City of New York of all the Bar Associations

in the State and *only* by the Appellate Division, First Department of all the Appellate Divisions in the State.

It has further omitted to point out that the "outmoding" was occasioned or is to be justified by any change in the statutory law of the State and that it was based simply upon the arrogation to itself by the Association of a privilege unaccorded it by law.

The law as interpreted by the Court of Appeals is still strictly observed in all the other Departments of the State. In all of them, disciplinary proceedings still are brought on, as they have always been, by an order to show cause made by the Court itself *after a preliminary investigation* of the charges contained in the Petition.

Of great significance in this connection, moreover, is the fact that in the widely publicised disbarment proceeding currently pending before the Appellate Division, First Department against former Magistrate Thomas Aurelio, both the Association and the Appellate Division have dropped their impudent pretense that a law can be nullified a la mode and for the first time in 39 years, have scrupulously followed the process here outlined by your petitioner as the only due process authorized by the laws of New York State. Specifically, the Association, in proceeding against Aurelio, submitted its Petition, accompanied by an Order to Show Cause, to Presiding Justice Francis Martin whereupon that crudely-cast adornment of the bench and the back-rooms, demonstrating that shame at length had come to Shanteytown, duly signed the order to show cause and, upon its return, duly and, for a change, legally nominated the District Attorney of New York County to prosecute the charges contained in the Petition.

So that the fact is that the Appellate Division, First Department, since its lawless disposition of the present case, has forsaken lawlessness or, in any event, one type of lawlessness and has returned into the fold, along with

the other Appellate Divisions of the State and now conducts disciplinary proceedings in accordance with law.

Its action in the *Aurelio* case is surely a public admission that its action in the present case was indefensible and that it was wholly without authority to have entertained it at all.

It is elementary that a decree in a proceeding which a Court is without authority to entertain is a total nullity.

In *Matter of Will of Walker,* 136 N. Y. 20 (1892), this Court said

> "The objections to this decree are jurisdictional. The consent of the parties is not sufficient to avoid their fatal effect. *Wherever there is a want of authority to hear and determine the subject matter of the controversy,* an adjudication upon the merits is a nullity and does not estop an assenting party. (Citing 8 N. Y. 254, *Chemung Canal Bank* v. *Judson.*)"

Cf. also:

> *Matter of Doey,* 224 N. Y. 30;
> *Matter of Newham,* 232 N. Y. 37 (1921);
> *Matter of Samson,* 265 A. D. 259.

In the last mentioned case (*Matter of Samson*) the petitioner, Samson, sought a review under Section 78 of the Civil Practice Act of the determination of the Board of Regents of the University of the State of New York suspending his license to practice accountancy on the ground that the hearings on the charges against him had been conducted before a sub-committee of two, despite the requirement of the Education Law that such a hearing must be conducted by a committee of "not less than three members of the Regents". The Court, in sustaining the prayer of the petition, said:

> "I believe, furthermore, that it is fundamental that a question of jurisdiction is involved that is not subject to waiver by either party. It was held in *Matter of Newham* v. *Chile Exploration Co.*, 232 N. Y. 37 at page 24 that 'it is elementary that no agreement, waiver or stipulation could confer upon the State of New York or its Courts or commissions jurisdiction which it does not and cannot possess'. * * * The position and powers of the Regents, like the position and powers of this Court, are legislatively created. * * * They simply do not exist except in accordance with the provisions of law creating them. * * * The determination must accordingly be vacated and the petitioner reinstated."

To the same effect, is the holding of the same Court (Appellate Division, Third Department) in *Matter of Bender,* 262 App. Div. 627 (1941) where it was held that the holder of a license to practice dentistry could not be deprived of it "without due process of law".

That the Supreme Court of the United States, in disciplinary proceedings instituted against members of its Bar, follows the same practice laid down by Section 88 of the Judiciary Law as interpreted by the Court of Appeals and requires the petition to be presented to it and served, if at all, upon the respondent only upon its own order to show cause is demonstrated in *Selling* v. *Radford,* 243 U. S. 46, wherein not only was *the matter brought on by an order to show cause after the presentation to the Court of the petition,* but wherein the Court specifically held that it would not entertain a petition for the disbarment of an attorney which petition was based exclusively upon the record of his disbarment in a State Court if it appeared that the proceeding in the State Court had been "wanting in due process" (as here) and if it appeared that "there was such an infirmity as to facts found (as here) to have

established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject".

It is respectfully submitted that for a disbarment order obtained in a proceeding instituted as this one was to be sustained by this Honorable Court would be as unearthly as would be its sustaining a default judgment entered on a telegraphed summons and complaint.

POINT III.

The honesty of the Appellate Division, First Department, prior to its taking jurisdiction of the proceeding against petitioner, had been repeatedly and publicly challenged by petitioner. So that even if the jurisdiction which it took had not been a violation of due process of law, per se, its taking it under such circumstances would have been and would have constituted a departure from the accepted and usual course of judicial proceedings so drastic as to call for an exercise of this Court's power of supervision.

The prejudice and animosity which motivated the Appellate Division are disclosed not only by its high-handed disregard of the statutory law of the State in its conduct of the proceeding, as demonstrated in Point II supra, but also by the circumstance that, although the truth and propriety of petitioner's statements regarding the judges of the State of New York attacked by him had not been put in issue by the Association in its Petition nor questioned by the Referee in his Report, the Court itself, nevertheless, in its Opinion (Rec. p. 239) unhesitatingly characterized the attacks as "malicious", "vituperative" and finally, categorically as "false". Untrammelled by any consideration for accuracy, truth or even for human

dignity, it went further and "found" that petitioner, in publishing the letters, had attempted to "coerce" judges from "the fearless discharge of their duties" in the Ledyard Estate litigation although it was a matter of record before them that all litigation in that estate had been terminated more than a year and half before the first of the letters was published.

Finally, in a sputtering, muddy upheaval of bog-Irish bad-temper, this Gilbertian tribunal found that your petitioner, in publicly denouncing the judicial thieves (including themselves) who had connived at the spoliation of his children's birth-right, had been "guilty" of "gross moral turpitude".

That such grand climacteric ranting is irreconcilable with the fair and disinterested dispensation of justice implicit in the concept of due process cannot reasonably be questioned. And that due process, as well as common decency required the Appellate Division, under the circumstances and in the obscene trantrum it was in, to refer the matter to another forum cannot be questioned either.

Cooke v. *U. S.* 267 U. S. 517.

Cf. also the last paragraph of the dissenting opinion in *Bridges* v. *California, supra.*

It is elementary that in a proceeding of this character, your petitioner was entitled to be advised of the issues which he would be required to meet. The truth of his statements was certainly not one of the issues raised by the Association in its Petition. On the contrary, that body was only too careful to side-step raising that issue and has so remained to this day.

The Appellate Division, First Department, itself laid down the law in connection with an anomaly of this kind succinctly in *Matter of Goebel,* 263 A. D. 516, 1942 where it stated:

> "We think that prejudicial error was committed by the Surrogate in determining the validity of the check upon a ground which the parties did not urge. 'Parties come to Court to try the issues made by the pleadings and Courts have no right impromptu to make new issues for them on the trial, to their surprise or prejudice *or found judgments on grounds not put in issue* and distinctly and fairly litigated'. (*Wright* v. *Delafield*, 25 N. Y. 266, 270. See also, *Southwick* v. *First National Bank of Memphis*, 84 N. Y. 420-428; *McNeil* v. *Cobb*, 186 A. D. 177, affd. 230 N. Y. 536.)"

And as Mr. Justice Murphy of this Court quoted in *Thornhill* v. *Alabama*, 310 U. S. 88 (p. 96):

> "Conviction upon a charge not made would be sheer denial of due process." Citing *Dejonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359.

POINT IV.

The Association was wholly without authority under the terms of its by-laws to have instituted the proceeding in the circumstances in which it did institute it and its being permitted by the Court below to do so was, therefore, a violation of due process and constituted so drastic a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This proceeding was instituted against petitioner by the Association although no investigation into the charges upon which it is based had been conducted by its Committee on Grievances as provided by Section 6, paragraph

2, subd. B of its By-laws which requires that such an investigation must have been conducted upon due notice to the accused and in his presence.

The only exception to the above procedure allowed by the By-laws of the petitioner is set forth in Section 16, paragraph 3, wherein it is provided that the Executive Committee of the Association may waive the preliminary investigation where "the public interest requires prompt action".

It cannot be claimed that the Executive Committee sought to act in this case under this exception since the substance of all the publications of petitioner which allegedly constitute professional misconduct was contained in the first of those publications, to wit, the letter of December 10th, 1940 (Cf. Record p. 13) to the Committee on Grievances of the Association which was received by it, as well as the members of the Executive Committee more than twelve months prior to the institution of this proceeding.

It cannot be claimed by the Executive Committee that this proceeding was based upon the necessity for "prompt action" in view of the fact that during the entire twelve months, the Grievance Committee, as well as itself, made no attempt whatever to investigate the truth and justifiability of that communication and for a period of more than three months after its publication, wholly ignored it, even to the extent of refraining from acknowledging its receipt.

It thus appears that this proceeding was instituted against petitioner without any preliminary investigation whatever into the propriety of the charges against him having been made either by the Appellate Division as required of it by law or by the Grievance Committee of the Bar Association as required of it by law.

The explanation of this phenomenon is, of course, not as mysterious as it at first glance appears. Since clearly,

such a "preliminary investigation" by either the Court or the Association would necessarily have involved *both* of those institutions in the acutely embarrassing dilemma of passing judgment upon the conduct and integrity of their own members.

And it is an unquestionable fact that although petitioner's letters, which were sworn to by him, presented in the most fulsome detail inarguable evidence of the corruption of the Judges named by him and of the lawyers named by him, neither the Appellate Division, First Department nor the Grievance Committee or any other Committee of the Association has to this day made the slightest move towards investigating these accusations.

CONCLUSION.

For the reasons above stated, therefore, petitioner respectfully urges that the petition for certiorari in the instant case should be granted.

Dated, October 27th, 1943.

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